

IN THE SUPREME COURT OF MISSOURI

NO. SC 85292

RIVERSIDE-QUINDARO BEND LEVEE DISTRICT,
PLATTE COUNTY, MISSOURI,

Respondent,

vs.

INTERCONTINENTAL ENGINEERING MANUFACTURING CORPORATION,
ESTATE OF ED YOUNG, WESLEY SEYLLER AND CAROL SEYLLER,
KITTERMAN, INC., PROLOGIS TRUST AND
SECURITY CAPITAL INDUSTRIAL TRUST,
WILLIAMS GAS PIPELINES CENTRAL, INC.,
WILLIAMS PIPELINE COMPANY, L.L.C.,
AND WILLIAMS COMMUNICATIONS,

Appellants.

BRIEF OF APPELLANTS

APPEAL FROM THE CIRCUIT COURT
OF PLATTE COUNTY, MISSOURI,
DIVISION I
CASE NO. 99 CC 0930

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JURISDICTIONAL STATEMENT

This Court accepted transfer of this appeal from the Missouri Court of Appeals for the Western District pursuant to the Missouri Constitution, Article V, Section 10. As set forth below, this Court has jurisdiction to hear this appeal under Missouri Revised Statutes Section 512.020, the Missouri Constitution, and established Missouri case law. This jurisdiction is not impaired by the provisions of Section 245.130.4.

This appeal involves the question of whether the strictly construed requirements of Chapter 245 of the Revised Statutes of Missouri (“Chapter 245”)¹ were complied with below, and whether the Circuit Court’s interpretation and application of Chapter 245 comport with the requirements of the Uniform Taxation Clause of the Missouri Constitution, and the Due Process Clauses of the Missouri and Federal Constitutions. Missouri statutory and case law provides that appellate jurisdiction exists in cases arising under Chapter 245 when statutory compliance and constitutional violations are the basis for appeal. See Mo. Rev. Stat. § 512.020; North Kansas City Levee Dist. v. Hillside Sec. Co., 187 S.W. 852, 854, 856 (Mo. 1916); In re Fabius River Drainage Dist., 35 S.W.3d 473, 475 n.1 (Mo. Ct. App.-E.D. 2001); In re Tri-County Levee Dist., 42 S.W.3d 779, 782 n.1, 788 (Mo. Ct. App.-E.D. 2001).

¹ Chapter 245 sets forth the procedures for establishing and financing flood control levee districts in Missouri. This appeal arises from a Chapter 245 proceeding for a proposed levee district located in Platte County, Missouri. Appellants are landowners within this levee district.

I. This Court Has the Authority to Enforce Compliance By the Circuit Courts With the Missouri and Federal Constitutions and With the Requirements of Statutory Law.

Missouri courts have repeatedly recognized that appellate jurisdiction exists to review violations of a litigant's constitutional and statutory rights by a circuit court. In the Fabius case, for instance, the court held that despite the absence of express language authorizing benefit assessment appeals within the Missouri drainage statute, the court had jurisdiction to determine whether the circuit court had complied with the strict requirements of the act.² Fabius, 35 S.W.3d at 475 n.1 (citing Peatman v. Worthington Drainage Dist., 176 S.W.2d 539, 545-46 (Mo. Ct. App.-K.C. 1943)). The court further held that it had jurisdiction to determine the appellants' various constitutional challenges to the assessment process. Id.

Consistent with Fabius, Appellants submit that a fundamental right exists to appeal violations of due process and other similar constitutional violations committed by a circuit court during a Chapter 245 proceeding. Id.; see also Marbury v. Madison, 5 U.S. 137, 163 (1803) (holding that "where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."). This Court has long recognized the Missouri Constitution to require that "when a right exists, all the means essential and necessary to the

² The Fabius case interpreted Chapter 242 of the Missouri Revised Statutes, dealing with drainage districts. The provisions of Chapters 242 and 245 are similar and courts interpreting Chapter 245 rely on cases interpreting Chapter 242. See J.A. Bruening Co. v. Liberty Landing Dist., 475 S.W.2d 125, 126 (Mo. 1972).

enforcement of that right are implied.” State ex rel. Martin v. Wofford, 25 S.W. 851, 854 (Mo. 1894). Thus, a fundamental right exists to appeal constitutional violations committed by a circuit court.

As set forth fully in Section IV below, Appellants allege that the Circuit Court, in exercise of its legislatively delegated functions, violated their constitutional rights to due process and uniform taxation. These rights are clearly established under the Missouri and Federal Constitutions. Unless this Court exercises appellate jurisdiction to remedy the violations committed by the Circuit Court, Appellants will have no recourse for the invasion of these fundamental constitutional rights. The Constitution does not countenance such an outcome.

Case law from the United States Supreme Court supports this position. The Supreme Court has held that “serious constitutional questions” are raised if statutes are construed to “deny any judicial forum for a colorable constitutional claim.” Webster v. Doe, 486 U.S. 592, 603 (1988) (citing Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986)). When it is the circuit court that is alleged to have committed the constitutional transgression, the only forum for remedying the violation is the appellate courts. Thus, to comport with United States Supreme Court precedent, Missouri law must be interpreted to allow appeals of constitutional deprivations by the circuit court. Cf. Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484-87 (1983) (noting that the district court lacked jurisdiction to review state court’s bar admission decision, but had jurisdiction to hear constitutional challenges to the rule itself).

Absent an inherent right to review constitutional violations, the citizens of this state stand vulnerable to the potentially arbitrary decisions of the legislatively designated arbiter—in this case, the circuit courts. The circuit courts would have unfettered power to disregard the constitutional mandates that ordinarily govern their actions. For example, a court could find that all Black landowners in a levee district must pay a higher benefit assessment than non-Blacks. Or, the court could base its assessments on support for the judge’s upcoming election/retention campaign. The potential abuses are as wide-ranging as the Court’s imagination. It is simply unthinkable that the legislature could have intended, or that the Constitution would permit, a state actor to commit constitutional violations without judicial recourse—in this case, appellate review of a circuit court’s violation of constitutional mandates. Appellate jurisdiction must exist to review and remedy such violations of the State and Federal Constitutions.

II. Under Section 512.020, this Court has General Appellate Jurisdiction Over Issues of Statutory Compliance and the Deprivation of Constitutional Rights, and Section 245.130.4 Does Not Divest this Court of Such Jurisdiction.

Even absent an inherent authority to correct constitutional violations committed by circuit courts in the benefit assessment process, this Court has a statutory basis for jurisdiction. Section 512.020 of the Missouri Revised Statutes provides that “[a]ny party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited by statutory proceedings, may take his appeal. . . .” (emphasis added). Statutes authorizing appeals, such as Section 512.020,

should be liberally construed as appeals are favored in the law. In re Moore's Estate, 189 S.W.2d 229, 233 (Mo. 1945); Hutchinson v. Wesley (In re Hutchinson), 455 S.W.2d 21, 23 (Mo. Ct. App.-Spfd. 1970). In the absence of an express statutory limitation elsewhere, Appellants have the right to appeal under Section 512.020. See Smith v. Missouri Bd. of Prob. & Parole, 743 S.W.2d 123, 125 (Mo. Ct. App.-W.D. 1988) ("courts should restrict access to judicial review only if there is clear and convincing evidence that the legislature intended this result.").

Here, no clear and convincing evidence exists that the legislature intended to restrict appellate review of statutory and constitutional violations committed by the circuit court during a Chapter 245 proceeding.³ The statute is simply silent as to such appeals. Chapter 245 does attempt to streamline the assessment process by limiting appeals that derive solely from a disagreement with the commissioners' assessment of benefits. Mo. Rev. Stat. § 245.130.4; see also Birmingham Drainage Dist. v. Chi., B. & Q.R.R., 202 S.W. 404, 407-08 (Mo. 1917). But the mere designation of "just compensation" and "damages" as appellate issues does not provide clear and convincing evidence that the legislature intended to prohibit appeals related to statutory and constitutional compliance.

³ If this Court determines that the legislature intended to bar all constitutional claims arising from a Chapter 245 proceeding, then the validity of the statute itself is called into question under Webster, Bowen, and Feldman. See supra p. 3. An established rule of statutory construction, however, is that a statute should be interpreted so as to render it constitutional. Hampton v. Hampton, 17 S.W.3d 599, 604 (Mo. Ct. App.-W.D. 2000).

Indeed, any appellate limitations inferred from Section 245.130.4 presuppose that the circuit court strictly followed the statute and otherwise complied with all constitutional mandates. Fabius, 35 S.W.3d at 474 n.1; Peatman v. Worthington Drainage Dist., 176 S.W.2d 539, 546 (Mo. Ct. App.-K.C. 1943) (“district had no such taxing power except when exercised in strict conformity to the statute granting such power”). Only if the circuit court followed the strict requirements of Chapter 245, and only if its procedures did not otherwise violate the constitutional rights of the litigants, should appeals be limited to the denominated appellate categories of Section 245.130.4. The legislature surely did not intend that its efforts to streamline judicial review in Section 245.130.4 would also wholly immunize the circuit court’s procedures and findings from constitutional scrutiny. Such an interpretation makes the unwarranted assumption that the legislature intended to “throw the judicial baby out with the bath water.”

Similarly, the legislature could not have intended to grant unfettered discretion to the circuit court to utterly disregard the very legislation it was directed to carry out.⁴ Such an interpretation of Chapter 245 assumes that the legislature drafted legislation with specific methods for forming and funding a levee district, but then empowered the circuit courts with

⁴ As stated in State ex rel. Bates v. Mackin, 208 S.W. 638, 639 (Mo. Ct. App.-K.C. 1918), the liberal construction afforded levee district statutes “does not apply to steps which are in their nature conditions precedent to the levying of the assessment. If any of these steps is omitted, the assessment is invalid.” See also North Kansas City Levee Dist., 187 S.W. at 854-56.

carte blanche discretion to wholly ignore these procedures. This interpretation also flouts a cardinal principle of statutory construction, that “all provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning.” Sermchief v. Gonzales, 660 S.W.2d 683, 689 (Mo. 1983). A statute comprised of completely disposable terms is by definition a meaningless statute.

In Missouri, appeals are allowed “almost as a matter of right.” St. Joseph Lead Co. v. State Tax Comm’n, 352 S.W.2d 656, 660 (Mo. 1962); accord Mo. Rev. Stat. § 512.020. Appellants submit that this right is even more pronounced when bedrock constitutional rights are threatened. Likewise, when the Circuit Court failed to follow the legislatively prescribed procedures under Chapter 245, Section 512.020 grants this Court appellate jurisdiction. Any doubt as to legislative intent should be resolved in favor of jurisdiction. Mo. P.R.R. v. Davis (In re Estate of Dugan), 309 S.W.2d 137, 143 (Mo. Ct. App.-Spfd. 1957). Accordingly, this Court has jurisdiction to hear this appeal.

STATEMENT OF FACTS

This case arises from a project of the Riverside-Quindaro Bend Levee District, Platte County, Missouri (“Levee District”) to build a levee and flood control project along the Missouri River. At least a fourth of the \$70,000,000.00 cost of this project is to be paid by the landowners allegedly benefiting from the project. (LF 1177). The matter directly at issue in this case is the action by the Levee District to assess over \$18,000,000.00 in taxes in the form of a “benefit assessment” to all landowners it perceives as receiving a benefit from the proposed Riverside-Quindaro Bend Levee (“Levee”).

The Levee District was created by a decree of the Circuit Court of Platte County, Missouri (“Circuit Court” or “Trial Court”), pursuant to Chapter 245, R.S.Mo. (LF 1).⁵ Since its creation in 1918, the Levee District has been reorganized and amended a number of times by the Circuit Court, and currently includes properties covering approximately 2,400 acres in Platte County and Clay County, Missouri. (LF 1-2). All of the area encompassed by the Levee District in Platte County is located in the City of Riverside. (LF 1-2).

In March 1999, the Levee District’s Board of Supervisors received a Report of Engineer and Supplement to Plan for Reclamation (the “Plan”), prepared by the Levee District’s engineer, setting forth the details of a levee improvement plan to address flooding of the type that caused substantial damage in Riverside in 1993. (LF 2, 16). The Plan envisioned the construction of more substantial levees than those then in existence. (LF 16). Project costs, estimated at that time to be \$56,280,000, were to be shared by the Levee District and the federal government pursuant to an agreement between the Levee District and the Department of the Army. (LF 3, 32 *et seq.*). The local share of the project’s costs is financed by a combination of city participation payments, tax increment financing bonds, landowner participation payments and assessment bonds. (LF 4, 55).

On April 21, 1999, the Levee District filed its Petition in the Circuit Court seeking to approve the Plan, to amend the boundaries of the Levee District, to acquire the land,

⁵ References to the Legal File are noted as “LF”, while references to the three-volume Transcript are noted as “Tr. I,” “Tr. II,” and “Tr. III.”

easements, rights-of-way and other property interests necessary for implementation of the Plan, and to appoint three commissioners to determine the value of the property interests to be taken and to assess the benefits and damages to be sustained by the affected landowners. (LF 1-7). The properties owned by Appellants and the interests in those properties that have now been acquired by the Levee District for this project are set forth in the Report subsequently filed by the Commissioners appointed by the Circuit Court. (LF 735 *et seq.*).

On June 30, 1999, the Trial Court convened a hearing to determine the allegations set forth in the Petition. (Tr. III, pp. 7 *et seq.*). The Levee District presented the testimony of a number of individuals concerning the Plan, including John Stacy, a commercial real estate consultant. (Tr. III, p. 181). Mr. Stacy was retained by the Levee District to conduct a study to determine whether the benefits of the project would outweigh its cost. (Tr. II, pp. 183 – 184). Mr. Stacy testified that after conducting a market analysis to ascertain the projected economic benefits to be derived from the project, he calculated that benefits would outweigh the project's local costs by about three to one and would outweigh total costs by a ratio of about 1.13 to one. (Tr. II, pp. 185 – 187). Neither Mr. Stacy nor any other witness at the June 30 hearing presented any testimony about how the alleged benefits should be allocated among the affected properties.

On July 13, 1999, the Trial Court entered its Findings of Fact, Conclusions of Law and Judgment-Decree (the “1999 Order”) amending the Levee District's boundaries, approving the Plan, and appointing three Commissioners to appraise the property to be taken, assess benefits and damages, and estimate the cost of improvements. (LF 254, 260). The Levee District subsequently filed an Amended Petition to reflect certain changes in the Plan.

(LF 306 *et seq.*). On June 22, 2000, the Trial Court entered its Findings of Fact, Conclusions of Law and Judgment-Decree confirming and incorporating its 1999 Order, approving the amendments to the Plan, and reaffirming the appointment of the three Commissioners. (LF 666-670). No further information is provided in the record concerning the Commissioners until the filing of their report.

On September 13, 2001, the Commissioners issued their report (the “Report”) assessing damages to be sustained by the affected landowners as a result of the takings described in the Amended Petition, and further assessing over \$75,000,000 in benefits to the landowners. (LF 735). The Report, together with a notice of its filing to all interested parties, was filed on September 14, 2001. (LF 735, 768). The thirty-five page Report consists of a number of columns with the following headings: description of property (by tract number); owners of property to be assessed; description of property assessed (by tax parcel number); number of acres assessed; amount of benefits assessed; types of interest being acquired (e.g., permanent right-of-way, temporary construction easement, etc.); number of acres taken; value of property taken; and damages other than value of property taken. (LF 736-764). The Report assesses benefits of \$1,908,599 against the tracts owned by the Estate of Ed Young, \$6,415,262 against the tracts owned by Intercontinental, \$5,517,834 against the tracts owned by ProLogis, \$174,078 against the tract owned by

Kitterman, \$1,453,825 against the tracts owned by the Seyllers and \$372,760 against the tracts owned by the Williams Companies. (LF 735 *et seq.*).⁶

The Report also contains a chart listing the Levee District's share of the estimated cost of improvements to be constructed by the project, together with the cost of the property acquired for right-of-way and the damages therefor. (LF 765). However, the Report does not describe or explain the process, assumptions, factual basis, methodology or other information utilized by the Commissioners to arrive at the allocation of benefits set forth in the Report. The Report also does not provide any information as to whether the Commissioners complied with the requirements set forth in Chapter 245, R.S.Mo.

Appellants timely⁷ filed their separate written exceptions to the Report within ten days after service and publication of notice of the filing of the Report, stating that the assessment of benefits was excessive, and asking the Trial Court to review and set aside the Report. (LF 772-777, 778-780, 781-793, 794-796, 828-832, 833-845). Appellants' exceptions also stated that the damages assessed by the Commissioners with respect to

⁶ The Report was subsequently amended upon motion by the Commissioners to correct certain numeric errors with respect to tracts not at issue in this appeal and to amend a footnote to the Report. (LF 853-859).

⁷ Although the exceptions of Appellants Wesley and Carol Seyller were filed after the deadline for filing exceptions, the Circuit Court granted these Appellants leave to file their exceptions out of time. (Tr. I at p. 139).

certain tracts were inadequate and requested a jury trial with respect to damages. (LF772-777, 778-780, 781-793, 794-796, 828-832, 833-845).⁸

Soon afterward, the Levee District filed and served a notice advising interested parties of a hearing to be held on October 4, 2001, “to determine any exceptions to the [Report], and the estimated cost of the construction of improvements contemplated in the Amended Plan of Reclamation compared to the benefits assessed and to consider approval and confirmation of the [Report]” (LF 771). Neither this notice, nor any subsequent notice or filing, described the procedure to be followed at the October 4 hearing.

At the outset of the October 4 hearing, the Trial Court announced how it intended to proceed. (Tr. I, p. 9). The “summary proceeding” as explained by the Trial Court, would allow counsel to make legal arguments, file affidavits and “anything else they wished to present,” except live testimony. (Tr. I, p. 9). The Trial Court indicated the parties would have the opportunity to present live testimony at a jury trial of exceptions. (Tr. I, p. 9). The Trial Court proceeded to call the names of those parties having filed exceptions and had counsel state their appearances and note their clients’ exceptions. (Tr. I, pp. 10 *et seq.*). Following this roll call, counsel for a number of landowners presented argument on various general issues raised by their exceptions and presented their views as to how the Court should proceed.

⁸ The Levee District also filed exceptions with respect to the damages awarded to a number of landowners. (LF 797-827).

During oral argument at the October 4 hearing, counsel for the Levee District conceded that the landowners were entitled to a jury trial on the damage exceptions. (Tr. I, p. 72, 75). In other words, the landowners would be entitled to have a jury determine the value of the property taken by the Levee District for the project. With respect to the issue of benefits, however, the Levee District urged the Court not to allow a jury trial. (Tr. I, p. 72-75). That issue, counsel urged, should be left for the Trial Court's determination. (Tr. I, p. 75). The Levee District's counsel further expressed his view that the assessment of benefits is "frankly reserved to the Commissioners," and cautioned against their conclusions being second-guessed. (Tr. I, p. 76).

The Levee District's counsel further indicated that the Levee District had supplied the Commissioners with "volumes of information" about the affected properties, and made available the Levee District's engineer and appraiser. (Tr. I, p. 77). The Commissioners' resulting determination, he suggested, was a "fair result." (Tr. I, p. 77). Counsel for Appellants unanimously expressed their concern that Appellants had not been provided with any of the information apparently given to the Commissioners, and that the Report failed to indicate the standards or criteria used by the Commissioners to determine and allocate benefits. (Tr. I, p. 79-81; 87-88; 91-92; 127).

In response to the concerns expressed by Appellants' counsel, the Levee District's counsel indicated that the Commissioners had requested some specific information about the properties, such as assessed valuation figures, whether tracts were improved or unimproved, and whether tracts were above or below the 100-year flood plain. (Tr. I, p. 86). Counsel acknowledged, though, that he was not privy to what else the Commissioners considered in

their deliberations. (Tr. I, p. 86). At no time during the October 4 hearing did the Levee District's counsel, or anyone else, identify or explain the methodology followed by the Commissioners in allocating benefits among the various tracts.

A significant portion of the October 4 hearing was dedicated to the issues of whether the landowners were entitled to jury trials, and whether the landowners should be granted some form of access to the Commissioners' methodology and work papers. (Tr. I, pp. 1-146). After hearing extensive argument by counsel on this and other topics, the Trial Court granted those landowners having filed exceptions to the benefit assessments leave to file suggestions or affidavits and established a briefing schedule. (Tr. I, p. 139). The focus of these additional suggestions or affidavits was not specifically defined.

In response to the Trial Court's direction, the Seyllers filed suggestions in opposition to the Report which included two appraisals⁹ by MAI appraisers indicating their opinion that any potential benefit derived from the contemplated improvements would not result in an overall property value increase in excess of one dollar per square foot, an amount less than one-half the benefits assessed by the Report. (LF 884 *et seq.*). The Seyllers' suggestions also pointed out the lack of evidence in the record concerning the process, assumptions, factual basis or other information utilized by the Commissioners to arrive at the benefit numbers set forth in the Report. (LF 885). The Seyllers urged the Trial Court to allow the parties a

⁹ One of the submitted appraisals related to a tract that is not a part of this appeal and is no longer owned by the Seyllers. (LF 738, 970).

reasonable period of time in which to conduct discovery and, upon completion of discovery, to conduct a hearing to present evidence and argue the deficiencies in the Report. (LF886).

Young, Intercontinental, ProLogis, and Kitterman filed Motions for Review of Commissioners' Assessment of Benefits in which they requested the Trial Court to: (a) order the Commissioners to provide Defendants with the information, documents, procedures, recommendations and methodologies relied upon in preparing the Report; (b) order the Commissioners to reopen consideration of their benefit assessments for the purpose of allowing Defendants to present information, recommendations and other considerations relevant to an accurate assessment of benefits; and (c) to provide specific means and procedures by which the Defendants might challenge the final determination of benefits by the Commissioners in a summary proceeding involving witnesses, evidence and examination of the Commissioners. (LF 1056, 1069-79).

In connection with its motion, the Estate of Ed Young submitted the affidavit of Guy Zeke Young, the estate's personal representative. (LF 1086). Mr. Young offered his opinion that the actual benefits to be received from the proposed levee would be much less than the \$1,908,599.00 set forth in the Commissioners' Report. (LF 1086). Mr. Young also revealed that the proprietors of the Young property had spent considerable resources "building up" sections of the property above the 500-year flood plain, making any protections offered by the proposed levee largely redundant. (LF 1086). Finally, Mr. Young stated that due to the lack of information about the methodology utilized by the Commissioners, the Estate of Ed Young was unable to contest the methodology or present other evidence on this point.

(LF 1086). Intercontinental submitted the affidavit of its President, Brian D. Everist, who offered much the same opinion. (LF 1083).

The Levee District filed a response to the motion by ProLogis and Kitterman in which it argued that the “summary proceeding” referred to in Section 245.130 does not envision discovery. (LF 1111-1112). The Levee District also argued that movants had been accorded “more than adequate rights to present evidence, cross-examine witnesses, file supporting documents and information, and otherwise contest the assessment of benefits” (LF 1112). In support of this assertion, the Levee District pointed to the testimony of Mr. Stacy at the June 30, 1999 hearing (who, as previously noted, offered no testimony as to the allocation of benefits among the landowners). (LF 1113).

The Levee District’s written response attached the two-page affidavit of Edward A. Coulson, the Commissioners’ chairman, dated October 19, 2001 (the same date as the Levee District’s response and several days after Appellants filed their additional briefs). (LF 1118-1119). The purpose of this affidavit was to “explain[] the methodology used in the allocation formula applied by the Commissioners.” (LF 1113). Mr. Coulson’s affidavit purported to set forth a formula followed by the Commissioners to determine the amount of benefits to be allocated to each party. Mr. Coulson’s affidavit identified four categories of properties (e.g., developed properties currently located above the 100-year flood plain) and “applicable weighting percentages” of 175%, 150%, 100% and 0%. (LF 1118). The affidavit explained that once each property was placed within the appropriate category, the property owner’s number of acres was multiplied by the applicable weighting percentage and divided by “total allocable acres” to arrive at the property owner’s percentage allocation of total benefits,

which he stated to be \$69,000,000. (LF 1118–1119). The Coulson affidavit does not explain, among other things, how the Commissioners determined the total benefits to be \$69,000,000, how the “weighting percentages” were calculated, how the “property owner’s acres” were determined, what bench marks were used for the 100-year flood plain, how tracts were placed into which category, how they defined the term “developed,” or the number of total allocable acres. The Circuit Court did not afford the Appellants an opportunity to respond to this new evidence presented by the Levee District, but, nonetheless, it relied upon this evidence in confirming the Report. (LF 1124).

On October 23, 2001, four days after the Coulson affidavit had been presented, the Trial Court entered its Order and Judgment Confirming Commissioners’ Report (the “Confirming Order”). (LF 1120-1126). The Circuit Court first recited the alleged procedural history of the Commissioners’ activities. (LF 1120-1123). However, the Court did not support these findings with citations to the record. (LF 1120-1123). The Trial Court then found and determined that all parties filing timely exceptions to the assessment of damages were entitled to a jury trial on the issue of damages. (LF 1124). With respect to the exceptions as to benefits, the Trial Court first found that it had received “testimony and other evidence concerning benefits” at the hearing held on June 30, 1999. (LF 1124). Since that hearing, the Trial Court went on to find that all parties had been afforded the opportunity “to file additional statements and supporting affidavits concerning the assessment of benefits set forth in the Report.” (LF 1128). The Trial Court indicated that after reviewing “all exceptions and supporting statements and supporting affidavits,” it had concluded that “the amount of benefits determined by the Commissioners is reasonable and supported by the

uncontroverted evidence; that the allocation of benefits by the Commissioners is based on a reasonable allocation method supported by the evidence in the record; and that benefits have been properly determined as required by Chapter 245.” (LF 1124). The only “statement” or “affidavit” specifically identified by the Trial Court was the Coulson affidavit offered by the Levee District several days after Appellants filed their additional briefs. (LF 1124). The Trial Court’s October 23 Order denied all exceptions to the assessed benefits, except for certain modifications agreed to by certain parties, denied all requests for a jury trial on the issue of benefits, and confirmed and adopted the benefits assessed in the Report. (LF 1124, 1125).

Appellants thereafter filed separate motions for reconsideration of the Trial Court’s Confirming Order pursuant to Rules 74.06(a), 75.01, 78.01 and 78.04. (LF 1130-1175). Appellants also requested, in the event their motions for reconsideration were denied, that the Trial Court’s confirmation of the benefit assessment should be certified for immediate appeal pursuant to Rule 74.01. (LF 1130-1175).

On December 6, 2001, the Levee District filed its Response to the Defendants’ Motion for Reconsideration. (LF 1176-1187). In these Suggestions, the Levee District stated in part as follows:

All information required for the court to confirm the Commissioners’ Report is contained in the Commissioners’ Report. Although Commissioner Coulson chose to file an affidavit explaining the Commissioners’ methodology in response to the repeated demands of Movants, Movants were not entitled to an explanation of the methodology and the Court was not required to have an

explanation of the underlying methodology prior to confirming the report in
the summary manner required by Chapter 245.

[emphasis added] (LF 1178).

Appellants' motions for reconsideration were argued to the Trial Court on December 6, 2001. (Tr. III, pp. 152 et seq.) Appellants' counsel again argued that until they were provided with access, through discovery or otherwise, to the exact process and methodology followed by the Commissioners, Appellants would be unable to intelligently determine whether there was a rational basis for the Report. (Tr. II, pp. 173-79). During his argument, the Levee District's counsel stated that it was "not necessary for [the landowners] to know how the commissioners came up with their number." (Tr. II, pp. 188-89).

Immediately upon conclusion of the December 6 hearing, the Trial Court made docket entries, followed by formal orders, denying each of Appellants' motions for reconsideration. (LF 1188-1189, 1260-1268). The Trial Court further found, pursuant to Rule 74.01(b), that there was no just cause for delay in appeal. (LF 1188-1189). Appellants timely filed their separate notices of appeal (LF 1191-1259, 1269-1278), which were later consolidated by the Missouri Court of Appeals for the Western District. This Court granted transfer of this appeal on July 1, 2003.

POINTS RELIED ON

- I. The Circuit Court Erred when it Confirmed the Report of the Commissioners because the Court Failed to Follow the Procedures Implicitly Required under Chapter 245, as it did not Afford the Landowners the Opportunity to Discover the Basis for the Commissioners' Conclusions and to Challenge their Assumptions, Calculations, and Methodology.**

In re Tri-County Levee Dist., 42 S.W.3d 779 (Mo. Ct. App.-E.D. 2001).

In re Fabius River Drainage Dist., 35 S.W.3d 473 (Mo. Ct. App.-E.D. 2001).

Mo. Rev. Stat. §§ 245.010 *et seq.*

- II. The Circuit Court Erred in Determining that the Commissioners' Assessment of Benefits was Based on a "reasonable allocation method" because no Evidence in the Record Supports Such a Determination, and the Record Below Offers No Explanation of the Work Performed by the Commissioners.**

In re Tri-County Levee Dist., 42 S.W.3d 779 (Mo. Ct. App.-E.D. 2001).

Mo. Rev. Stat. §§ 245.010 *et seq.*

III. The Circuit Court Erred in Confirming the Report of the Commissioners because the Commissioners' Methodology Failed to Adhere to the Requirements of Chapter 245 in that the Commissioners Failed to Make an Individualized Assessment of Each Tract of Land and Further Misapplied their Own Methodology.

In re Tri-County Levee Dist., 42 S.W.3d 779 (Mo. Ct. App.-E.D. 2001).

Mo. Rev. Stat. § 245.010 *et seq.*

IV. The Circuit Court Erred in Confirming the Commissioners' Report, because the Due Process Clauses of the Missouri and Federal Constitutions Require the Government to Afford its Citizens the Opportunity for a Meaningful Hearing and the Right to Discover the Basis for its Actions, Prior to the Taking of Property and/or Assessment of a Tax, and the Trial Court Provided No Meaningful Hearing Whatever.

Dabin v. Dir. of Revenue, 9 S.W.3d 610 (Mo. 2000).

Moore v. Bd. of Educ., 836 S.W.2d 943 (Mo. 1992).

Hopkins v. Odom, 619 S.W.2d 857 (Mo. Ct. App.-W.D. 1981).

Birmingham Drainage Dist. v. Chi., B. & Q.R.R., 202 S.W. 404 (Mo. 1917).

Mo. Const. art. X, § 3.

U.S. Const. amend. XIV.

Mo. Const. art. I, § 10.

Mo. Rev. Stat. §§ 245.010 *et seq.*

STANDARD OF REVIEW

The standard of review for the points raised in this Appeal is unclear, because the nature of the proceeding giving rise to the judgment below is unclear. The Circuit Court's abbreviated hearing, which it termed a "summary proceeding," might be classified as an abbreviated bench trial, a summary judgment proceeding, or some hybrid of the two. All have different standards of review. Therefore, this Court's standard of review is dependent upon the classification of the trial court's proceedings. As discussed below, because the trial court did not provide the procedures normally associated with a bench trial (ability to call live witnesses, discovery, cross-examination, etc.), this Court should review the judgment below de novo. However, because the Circuit Court's procedures are less than clear, Appellants will discuss the standard of review for all of the possible proceedings.

If this Court considers the Circuit Court's procedures as the equivalent of a bench trial pursuant to Supreme Court Rule 73.01, then the standard set forth in In re Tri-County Levee District, 42 S.W.3d 779, 782 (Mo. Ct. App.-E.D. 2001), should govern. In reviewing a court-tried case, this Court should affirm the trial court's judgment unless there is "no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." Id. In making a determination whether sufficient evidence supports the trial court's judgment, the Court should review the evidence in a light most favorable to the judgment. Id. The Court pays deference to the trial court's determination of the credibility of witnesses. In re Fabius River Drainage Dist., 35 S.W.3d 473 (Mo. Ct. App.-E.D. 2001). Appellate courts review all questions of law de novo. Lakin v. Gen. Am. Mut. Holding, 55 S.W.3d 499, 503 (Mo. Ct. App.-W.D. 2001).

In a summary judgment proceeding this Court reviews decisions of the Circuit Court de novo, as the question of the propriety of the Court's summary judgment is purely a question of law. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993). The Court should review the record in a light most favorable to the party against whom the judgment was entered and must determine whether a genuine issue of fact exists. Id.

One "hybrid" standard of review involves bench trials entered into upon stipulated facts. The appellate court is not required to defer to the trial court's determination of facts submitted by stipulation, because there is no evidence from which conflicting inferences might be drawn and no deference to determinations of the credibility of witnesses. State ex rel. White Adver. Int'l v. State Highway Comm'n, 655 S.W.2d 860, 862 (Mo. Ct. App.-W.D. 1983). In such cases the appellate review assesses whether the trial court drew the proper legal conclusions from the stipulated facts. Miskimen v. Kansas City Star Co., 684 S.W.2d 394, 398 (Mo. Ct. App.-W.D. 1984).

The procedures implemented by the Court below do not fall neatly within any defined category. Clearly, the Circuit Court did not afford the Appellants a bench trial as that term is defined in Supreme Court Rule 73. The Circuit Court refused to hear live testimony at any juncture of the benefits assessment proceeding. The Court also refused to allow any discovery, so there was no deposition testimony, nor any interrogatories or responses to requests for admissions. The procedure more closely resembled a summary judgment proceeding, as the Circuit Court merely allowed the parties to submit affidavits and any other written materials the parties wished to submit. Indeed, the Court made a specific finding in

its Order confirming the Commissioners' Report that there was no "genuine issue as to any material fact." (LF 1124). It should be noted, however, that the Circuit Court did not allow the Appellants to respond to the affidavit evidence submitted by the Respondent or engage in any discovery so as to present meaningful counter-evidence.

Under these circumstances, a de novo review of the Circuit Court's judgment below is appropriate. First, it is clear under any standard of review that this Court should review any legal determinations de novo. Lakin, 55 S.W.3d at 503. As to factual determinations, this Court should also review any findings de novo. This Court is presented with the same written record that the Circuit Court below reviewed. The Circuit Court did not allow live testimony and made no credibility determinations. Thus, this Court is in the same position as the Circuit Court below and should review its determination of facts and application of law without deference to the lower Court. Moreover, because of the "extreme and drastic" remedy imposed by the Circuit Court in confirming the Commissioners' Report without an opportunity for a trial, this Court should review the record in a light most favorable to the Appellants. Missouri Highway & Transp. Comm'n v. Overall, 53 S.W.3d 222, 225 (Mo. Ct. App.-E.D. 2001) (holding that courts are skeptical when a party is denied its day in court because such a course of action "borders on denial of due process.").

ARGUMENT

I. The Circuit Court Erred when it Confirmed the Report of the Commissioners because the Court Failed to Follow the Procedures Implicitly Required under Chapter 245, as it did not Afford the Landowners the Opportunity to Discover the Basis for the Commissioners' Conclusions and to Challenge their Assumptions, Calculations, and Methodology.

The Circuit Court erred in issuing the Order and Judgment Confirming Commissioners' Report, dated October 23, 2001, because the Court failed to follow the procedures required under Chapter 245. Specifically, the Court refused to permit the landowners to discover any of the methodology and assumptions utilized by the Commissioners. Without access to this information, Appellants did not have the opportunity to file meaningful exceptions to the Commissioners' Report as required by Missouri law. Moreover, the Court compounded its error by failing to afford the Appellants a meaningful "summary proceeding" in which to present these Exceptions. Under Chapter 245, the right to file exceptions and the ability to present these exceptions at a meaningful summary proceeding are prerequisites to the confirmation of the Commissioners' Report.

The requirements under Chapter 245 of the Missouri Revised Statutes serve as prerequisites to the assessment of a benefit or tax, and they must be strictly followed in order for an assessment to be valid. See In re Fabius River Drainage Dist., 35 S.W.3d 473, 475 n.1 (Mo. Ct. App.-E.D. 2001); State ex rel. Bates v. Mackin, 208 S.W. 638, 639 (Mo. Ct. App.-K.C. 1918). The procedures utilized by the Circuit Court below deviated from these

requirements because they did not provide Appellants with the ability to file meaningful Exceptions at any sort of consequential summary proceeding. Specifically, the “summary proceeding” afforded Appellants lacked meaning because the Circuit Court refused to allow the Appellants to have any access to the Commissioners’ methodology before filing their Exceptions to the Report. (Tr. I at pp. 80-81, 87-88) (requesting access to Commissioners’ methodology); (LF 1120-1126) (confirming Commissioners’ Report without allowing access to methodology).¹⁰ The Appellants were never afforded a bench or jury trial, or even an evidentiary hearing to present their Exceptions to the Circuit Court. (LF 1124-1125). The Court refused to allow live testimony of any kind, even that of the Commissioners. (Tr. I p. 13). Moreover, despite requests from Appellants and other landowners, the Court refused to order the Commissioners to reveal how they had calculated their assessment of benefits. (LF 1120-1126). Without such knowledge, Appellants were unable to prepare meaningful Exceptions as required under the statute.

The Court’s refusal to order the Commissioners to reveal their methodology prejudiced Appellants’ ability to file consequential Exceptions. Implicit in the statutory requirement that the Circuit Court must allow the landowners to present Exceptions to the

¹⁰ Moreover, a review of the transcript from the October 4 hearing reveals substantial confusion over what procedures were to be followed. (Tr. I, at pp. 9-14, 71-88, 144). Certainly the notice prepared by the Levee District’s counsel contained no description of the procedures. (LF 771). The result of these facts is that Appellants were never afforded a meaningful trial or hearing.

Commissioners' Report is the notion that the affected landowners have sufficient information to be able to intelligently determine whether Exceptions are needed. Also implicit is that the Exceptions must be of some consequence. In other words, the landowners must have the ability to demonstrate to the Court that the Report lacks a rational foundation. The Circuit Court denied Appellants this opportunity and instead merely afforded the landowners the ability to file hollow Exceptions to the Commissioners' Report which amounted to nothing more than "formality filings." Moreover, the Court then failed to allow the landowners to introduce evidence supporting their Exceptions at a bench trial or other similar evidentiary hearing, and instead required the landowners to "present" these Exceptions in the form of written "additional statements." (LF 1124). However, the additional filings were also mere formalities as the landowners still knew nothing more about the work performed by the Commissioners in compiling their Report. Without access to the Commissioners' methodology, presenting Exceptions at any summary proceeding is nothing more than an exercise in futility.

Access to the Commissioners' work and methodology is a vitally important component of the right to file Exceptions to the Commissioners' Report. Under the statutory scheme set forth in Chapter 245, the findings of the Commissioners are presumptively valid; the Circuit Court may "modify or amend" the Commissioners' Report based on any Exceptions, but the Court is required to "approve and confirm" the Report if the overall benefits of the project outweigh its costs. Mo. Rev. Stat. § 245.130.2. Furthermore, the Court may only modify or amend the Report if it determines that any finding is "arbitrary, unreasonable, or capricious." In re Tri-County Levee Dist., 42 S.W.3d 779, 788 (Mo. Ct.

App.-E.D. 2001).¹¹ The only conceivable basis for making such a determination is through the examination and evaluation of the Commissioners' methods. The Trial Court effectively denied Appellants their right to challenge the Commissioners' Report when it denied Appellants the ability to discover of its methodology, assumptions and calculations. The

¹¹ The role of Commissioners in a Chapter 245 levee district proceeding must also be contrasted with the role of commissioners in a standard condemnation proceeding. In a normal condemnation proceeding the commissioners are charged with appraising the property at issue and filing a report with the circuit court. Mo. Rev. Stat. § 523.040. The landowner is then allowed to file exceptions to this report. Id. § 523.050. The circuit judge then enters an order setting the amount of award for the property. Id. The condemnor is required to pay this amount into court before condemning the property. Id. § 523.040. However, the parties are allowed the opportunity to present their cases to a jury who will ultimately determine the value of the taking. Id. § 523.060. The commissioners' findings are never presented to the jury. In other words, the commissioners' findings have no bearing on the ultimate award.

Contrast this with the procedures under a Chapter 245 assessment of benefits. The circuit judge is required to accept the commissioners' report absent a finding the report is arbitrary, capricious, or unreasonable. Mo. Rev. Stat. § 245.130.2; Tri-County, 42 S.W.3d at 788. The judge then enters the assessment based on the report. Mo. Rev. Stat. § 245.130. There is no right to a jury trial and no right to appeal the judge's assessment. Id. § 245.130.2, .4.

Court compounded its error when it deprived Appellants of their rights to cross-examine the authors of the Report and to present testimony challenging the Report's conclusions. Due Process does not permit determination of rights on such a basis.¹²

Recent Missouri case law interpreting Chapter 245 fully supports Appellants' position. For example, in In re Tri-County Levee District, 42 S.W.3d 779 (Mo. Ct. App.-E.D. 2001), a levee district sought to readjust benefit assessments levied against the Missouri Highway and Transportation Commission ("MHTC"). Id. at 782. MHTC filed exceptions to the assessment of benefits and was granted a bench trial. At the trial "the Commissioners produced evidence used to calculate the benefits to MHTC." Id. (emphasis added). The circuit court affirmed the findings of the commissioners, holding that their assessment was "reasonable, appropriate and supported by substantial evidence in the record." Id. The Missouri Court of Appeals affirmed the decision of the circuit court, noting that the commissioners had offered testimony at trial explaining the methodology they used in determining the assessment of benefits. Id. at 788. Based on the "substantial evidence" produced at trial as to the commissioners' methodology and findings, the Court of Appeals

¹² Undoubtedly, the Respondents will argue that several of the Exceptions were successful. (LF 1124-25). However, all amendments to the Commissioners' Report were based on mere mathematical or other scriveners' errors made by the Commissioners. Exceptions must be more meaningful than the simple ability to point out to the Court that the Commissioners wrote 7 when they meant 8.

found that the commissioners' report had a "rational basis and is not arbitrary, unreasonable, or capricious." Id. at 788.

Conversely, the Appellants here received none of the procedural safeguards afforded the landowner in the Tri-County case. The Appellants were given no access to the Commissioners' methodology and no summary hearing or trial. (LF 1120-1126). As to the methodology, the Commissioners' Report contains little more than bare figures. (LF 735-767). Nothing indicates how those figures were ascertained. The affidavit of Ned Coulson, which contains a mathematical formula apparently used to calculate the benefit assessment, is wholly incomplete as it fails to define the variables in the formula and it fails to articulate how the formula was applied to each parcel within the district. (LF 1118-1119). Even if the Coulson Affidavit did contain enough information so that the Appellants could reasonably respond to it, the Appellants were given no such opportunity. The affidavit was offered by the Levee District after the Appellants had filed their Exceptions and further briefing. (LF 1111-1119, 778-845, 884-1089). The Circuit Court then confirmed the Commissioners' Report four days later and relied upon this affidavit without even hearing from the landowners as to their position regarding its contents. (LF 1120-1129). Despite repeated demands, the landowners were never given any type of evidentiary hearing or bench trial in which they could offer objections to the Commissioners' work or even inquire as to what the Commissioners had done. This procedure, by which the Circuit Court confirmed the work of the Commissioners on the ground that it was "reasonable," without any evidence as to how the Commissioners obtained the figures submitted (let alone any opportunity to cross-examine), violates the requirements of Chapter 245.

This conclusion is further supported by In re Fabius River Drainage District, 35 S.W.3d 473 (Mo. Ct. App. E.D. 2000). In Fabius, the MHTC again challenged the assessment of benefits made by a board of commissioners appointed to assess benefits to land within a drainage district. Id. at 475. Again, the circuit court held a bench trial. Id. at 476. At the trial, MHTC was allowed to examine the chairman of the commissioners, a member of the board of supervisors, and two expert witnesses, as well as introduce certain exhibits. The chairman of the commissioners testified as to the basis for the commissioners' findings and MHTC was allowed to cross-examine the chairman as well as present subpoenaed documents. Id. Again, the procedures afforded by the circuit court in Fabius stand in stark contrast to the abbreviated procedures implemented by the Circuit Court in the present case.

Four critical points may be taken from the courts' holdings in Tri-County and Fabius: (1) the litigants must be given access to the Commissioners' work and methodology; (2) the litigants must have the opportunity to present their exceptions at a meaningful summary proceeding; (3) a summary proceeding requires a bench trial or some other type of evidentiary hearing in which the litigants are allowed to present limited evidence to the court; and (4) at such a proceeding the litigants must be given the opportunity to examine the commissioners and probe the validity of their findings. Appellants here were afforded none of these basic safeguards. Accordingly, the Circuit Court's Order must be overturned and the case remanded for proceedings consistent with Chapter 245.

II. The Circuit Court Erred in Determining that the Commissioners’ Assessment of Benefits was Based on a “reasonable allocation method” because no Evidence in the Record Supports Such a Determination, and the Record Below Offers No Explanation of the Work Performed by the Commissioners.

The Circuit Court erred in determining that the Commissioners’ Report was based on a reasonable allocation method when the Court lacked any basis in the record to make such a finding. Without a basis for its finding of reasonableness, the Circuit Court’s decision must be overturned.

A. The Circuit Court’s Order and Judgment Confirming the Commissioners’ Report is Not Supported by Substantial Evidence as it Includes Factual Findings Having no Basis in the Record, and Relies Upon Impermissible Affidavit Testimony.

1. The Circuit Court Made Numerous Factual Findings Concerning the Work Performed by the Commissioners Which have no Support in the Record.

The Confirming Order makes numerous findings regarding the work and methodology employed by the Commissioners without any support in the record before the Court. The only portions of the record that even address the work performed by the Commissioners are the “Report of Commissioners” filed September 14, 2001, and the post hoc affidavit filed by Commissioner Chairman, Edward A. Coulson (“Coulson affidavit”). As discussed more thoroughly below in Section II(A)(2), the Court mistakenly relied upon

the Coulson affidavit in making its findings. However, even considering the improper Coulson affidavit, the record still does not support many critical findings in the Court's Confirming Order. The Court conducted no evidentiary hearing involving the Commissioners, the Court received no evidence via additional affidavits, and, in fact, the Court received no testimony of any kind concerning the work performed by the Commissioners. Yet, the Court made numerous findings not supported anywhere in the Commissioners' Report or the Coulson affidavit.

The following are excerpts from the Confirming Order which find no basis whatsoever in the record before the Circuit Court:

. . . that each of the Commissioners appointed is a resident of the State of Missouri, and that none of them is a landowner in the District or a Kin with the fourth degree of consanguinity to any person owning land in the District and each of whom is otherwise competent to perform all of the duties prescribed by law as Commissioner . . .

. . . that the Secretary of the Board of Supervisors of the District did furnish to the Commissioners a complete list of lands, all corporate and other property described in the Articles of Association or adjacent hereto, that will be affected by carrying on and putting into effect the Plan for Reclamation for the District, as amended and supplemented, and the names of the owners of such property.

. . . that the Commissioners, while engaged in their duties, were accompanied by the Secretary of the Board of Supervisors for the District or his deputy, and said

Secretary, or his deputy, performed all of the clerical work required by said Board of Commissioners . . .

. . . [t]hat the Commissioners, in assessing the benefits to the lands, public highways, railroads and rights of way or railroads, roadways and other property not traversed by such works, did not consider what benefits would be derived by such property after other levees, ditches, improvements, and other plans shall have been constructed, but they did assess only such benefits as are derived from the works and improvements set out in the Supplement to Plan of Reclamation, as amended and supplemented, for the District.

. . . that the Commissioners did give due consideration and credit to any other levee, ditch and other systems of reclamation which had already been constructed and which afford partial or complete protection to any tract or parcel of land in the aforesaid District.

(LF 1120-29).

Nowhere in the record before the Circuit Court is there the slightest support for these findings. The Court appeared simply to recite the Commissioners' requirements under the statute and make an assumption that in fact the Commissioners had carried out their duties. There is no testimony, either live, by affidavit or otherwise, supporting the Court's findings. No other evidence was offered by the Levee District explaining what work the Commissioners had performed. In short, the Circuit Court made factual findings without any basis in fact, and then confirmed the Commissioners' Report while relying on these unsupported findings.

2. The Circuit Court Erred in Relying Upon the Coulson Affidavit During the so-called “Summary Proceeding” as the Affidavit was Filed after the Landowners Had Filed their Exceptions.

In addition to making factual findings that are not supported in the record, the Circuit Court erred in relying upon the post hoc affidavit of Commissioner Coulson. (LF 1124). This affidavit, submitted by the Levee District and accepted by the Court without any opportunity for comment by Appellants, purports to provide the methodology utilized by the Commissioners in assessing their benefits (an obvious admission that such vital information was lacking from their initial Report). (LF 1118-1119). The landowners were not able to critique the affidavit in any way prior to the Court incorporating the affidavit into its Order. In essence, the Levee District was able to offer the testimony of the most central witness in this case, and the landowners were powerless to respond to this uncrossed testimony.¹³

¹³ The sequence of events leading up to the filing of the Coulson affidavit is crucial to understanding the impropriety of this evidence:

The Commissioners filed their Report on September 14, 2001. (LF 735-767).

The Court required the landowners to file all Exceptions and Suggestions in Support on or before October 15, 2001. (Tr. I at p.145).

On October 19, 2002, the Levee District filed a response to certain of the landowners’ Exceptions and attached the Coulson affidavit (which Commissioner Coulson provided to

Thus, in forming its most crucial opinion – that the Commissioners’ benefit allocation method was “reasonable” – the Circuit Court relied upon testimony presented by only one side to the litigation, while the other side was not allowed to cross-examine the affiant, offer additional statements from the affiant, or even submit written arguments responding to the statements made in the affidavit. The Circuit Court’s procedure violated due process, the principles of Rule 74.04 (establishing procedures for summary judgment and requiring an opportunity to submit arguments and contrary evidence), and the spirit of the adversarial judicial system.

In sum, the Circuit Court relied upon factual findings which have no basis in the record, and on the Coulson affidavit, when arriving at its ultimate legal conclusion that the benefit assessment was based on a “reasonable allocation method supported by the evidence in the record.” (LF 1124). Because the factual findings lack any foundation and because the Coulson affidavit should not be considered, the Court’s decision is without factual support and must be overturned.

the Levee District), for the purpose of “explaining the methodology used in the allocation formula applied by the Commissioners.” (LF 1111-1119).

On October 23, 2001, the Circuit Court entered the Confirming Order, and without prior indication or an opportunity to object, relied upon this new affidavit evidence offered by the Levee District. (LF 1120-1126).

B. When Considering only the Evidence Properly Submitted to the Circuit Court as to the Commissioners' Assessment of Benefits, the Commissioners' Report is Without a Rational Basis and is Arbitrary and Capricious because the Commissioners Failed to Provide a Basis for their Findings.

A review of the record properly before the Circuit Court reveals that the Court had no basis for its determination that the Commissioners' Report was "reasonable." In fact, the Commissioners' Report presents nothing but bare numbers. Although the first page of the Report presents two paragraphs of dialogue in which the Commissioners summarize some of the activities they engaged in (none of which explains the basis for their findings), the rest of the Report presents nothing but numbers. The Commissioners offer no explanation, formulas, or methodology. While the Commissioners' Report purports to make a finding of "Benefits Assessed" for each landowner, it provides no indication as to how that number was calculated. From the meager information provided in the Commissioners' Report, it is impossible for any court to determine whether the Commissioners' assessment of benefits had a "rational basis" and was not "arbitrary, unreasonable, or capricious." Tri-County, 42 S.W.3d at 788. Bare figures without explanation are the very definition of arbitrary and capricious. The Report fails to reveal what, if anything, the Commissioners did in arriving at these figures.¹⁴

¹⁴ Although the Levee District obtained and offered the Coulson affidavit into the record in support of its position, the Levee District has consistently argued that neither the

Moreover, the Levee District has implicitly admitted that the Commissioners' Report lacked a rational basis as it chose to obtain and offer the Coulson affidavit. In response to the landowners' arguments that the Court should require the Commissioners to reveal their methodology so that they could file meaningful Exceptions, the Levee District offered this affidavit. (LF 1111-1113). If, as the Levee District argued, the Court had a complete basis to confirm the Commissioners' Report, why did it offer the supplemental affidavit? The only conclusion is that the Levee District recognized that the Circuit Court did not have a basis in the record to conclude that the Report was reasonable. It therefore attempted to supplement the record after the fact to cure this deficiency, but without subjecting its evidence to any challenge.

Circuit Court nor the landowners were entitled to have an explanation of the underlying methodology of the Commissioners prior to confirming the Report. (LF 1178). Indeed, during oral arguments at the December 6 hearing, the Levee District's counsel stated his view that it was "not necessary for the [landowners] to know how the Commissioners came up with their number." (Tr. II, pp. 188-189). Accordingly, the only relevant record that the Court could have considered was the Report itself, and the Levee District is estopped from arguing to the contrary in this appeal.

Moreover and as discussed in Section II(C) below, even if the Coulson affidavit were properly considered by the Court there is still an insufficient basis for determining that the Commissioners' work was reasonable. The affidavit does not fully explain how the benefits were determined.

Accordingly, the Circuit Court's finding of reasonableness is simply without foundation. Just as the landowners had insufficient information to file meaningful Exceptions to the Commissioners' Report, the Circuit Court had insufficient information to determine whether the findings offered by the Commissioners were reasonable and supported by the record.

C. Even With the Additional Information Provided in the Coulson Affidavit, the Circuit Court Still Did Not have a Basis to Conclude that the Benefit Assessment was "Reasonable," Nor were the Landowners Able to Critique the Commissioners' Work or File Meaningful Exceptions.

As argued above, the introduction of the Coulson affidavit by the Levee District and the consideration of the affidavit by the Circuit Court, under circumstances in which the landowners were given no opportunity to counter the testimony presented, was improper and prejudicial. However, even if this Court does not find the Circuit Court's consideration of the post hoc affidavit to be a violation of Chapter 245, the Missouri Rules of Civil Procedure, and due process, this Court must still overturn the Circuit Court's Order because the affidavit provides insufficient information to support the Court's ruling. In other words, even if consideration of the affidavit was proper, the Court was still without a basis for concluding that the assessment of benefits to each landowner was reasonable. The affidavit provides

some insight as to the general methodology used by the Commissioners, but it provides no details as to how this general methodology was applied.¹⁵

Commissioner Coulson's affidavit indicates that the Commissioners utilized a formula in determining each landowner's assessment of benefits. (LF 1118-1119). However, the formula implements undefined variables and fails to explain how the formula was applied to each individual tract of land. The Commissioners' formula is as follows:

$$\frac{\text{Property Owner's Acres} \times \text{Applicable Weighting Percentage}}{\text{Total Allocable Acres}} = \text{Property Owner's Percentage Allocation of Benefits and Costs}$$

The Commissioners then set forth weighting percentages (175%, 150%, 100%, and 0%) based on vague descriptions of four categories of land. This represents the entirety of the Commissioners' description of their methodology, and the description failed to provide

¹⁵ As mentioned elsewhere in this brief, Appellants made attempts to contact Commissioner Coulson in the hope that he would define the variables implemented in the formula and provide the categorization of each parcel of land. This effort met with limited success. Although Commissioner Coulson provided some information to Appellants, he refused to sign any affidavit attesting to the information provided. (LF 1152-1157). Moreover, the Circuit Court refused to admit into evidence the affidavit of one of the Appellants' attorneys which memorialized his conversation with Commissioner Coulson. (Tr. II, pp. 187-90). Appellants made every reasonable effort to ascertain and present this information.

sufficient information for the Circuit Court or the landowners to determine whether the allocation was reasonable and correct.

First, the Commissioners' testimony does not define the first variable: "Property Owner's Acres." Based on information arising from informal telephone conversations with Commissioner Coulson and arguments made by the Levee District's attorney (who by statute "assisted" the Commissioners' in their work), it appears that this variable is derived from the Commissioners' Report under the category "Number of Acres Assessed." (LF 1152-1153); (Tr. II, pp. 183-85). However, this category is not defined, and the Commissioners do not explain how they determined how many acres to "assess." In some cases the number differs from the total acres owned by the landowner, and in others it does not. Nowhere in the record do the Commissioners explain how they calculated the "Property Owner's Acres."

Second, the Commissioners failed to inform the Court or the landowners as to which "Applicable Weighting Percentage" was assigned to each parcel of land. This percentage is both necessary for calculating the Commissioners' formula, and a likely area of dispute between the landowners and the Commissioners. Such information is necessary for informed Exceptions and for the Court's determination of "reasonableness." From the Commissioners' formula it appears that the terms "developed" and "100 year flood plain" played vital roles in the Commissioners' categorization of each parcel of land. (LF 1118-1119). Again, neither term is defined. Does "developed" mean land used for farming, cleared of brush and timber, graded, improved, paved over, having a building or structure, or occupied by persons? The Commissioners never explained what they meant by "developed." Nor do we know what benchmark they used for the 100-year flood plain.

Here, the lack of information is two-fold; not only did the Commissioners fail to explain which category they decided to place each parcel of land in, they also failed to define the assumptions and information used to make this determination. This ensured that neither the Circuit Court nor the landowners would be able to critique the Commissioners' judgment as to the categorization of each parcel of land.

Likewise, the Commissioners failed to define or provide the denominator of the formula stated as the "Total Allocable Acres." This number is apparently a constant in each calculation. Does that mean that the "Total Allocable Acres" represents the sum of all "Property Owner's Acres?" To be mathematically correct, the denominator would have to equal the total of the numerators for all of the tracts of land. Whether that is what the Commissioners did is not set out anywhere in the record. What number the Commissioners used in the denominator, or how they calculated such a figure, is simply unknown to the Circuit Court, the landowners, and now this Court.

Thus, even if the Circuit Court could properly have considered the Coulson affidavit as part of the record, it still had no basis for deciding that the Commissioners had reasonably determined the benefit allocation for each tract of land. Until the Circuit Court has the answers to the questions outlined above and until the variables utilized in the formula are known, there is absolutely no basis for concluding that the allocations were reasonable.

In sum, the Circuit Court erred in determining that the Commissioners' assessment of benefits was "reasonable," because it had no basis for making such a finding. The Court made factual findings without support in the record and relied upon impermissible affidavit testimony. Furthermore, nothing in the record below explains the work, assumptions or

methodology employed by the Commissioners. Thus, the Court had no means of determining whether the Commissioners' Report was reasonable. The Court's order confirming the Commissioners' Report must be overturned.

III. The Circuit Court Erred in Confirming the Report of the Commissioners because the Commissioners' Methodology Failed to Adhere to the Requirements of Chapter 245 in that the Commissioners Failed to Make an Individualized Assessment of Each Tract of Land and Further Misapplied their Own Methodology.

A. The Assumptions and Methodology Employed by the Commissioners Failed to Follow the Requirements of Chapter 245.

A proper assessment of costs and benefits under Chapter 245 requires the Commissioners to make an individualized assessment of each property. The record below fails to show that the Commissioners complied with this requirement, and therefore, the judgment confirming their Report must be reversed.

Because the Commissioners failed to follow the requirements of Chapter 245, the Circuit Court should have rejected their Report. As reflected by the formula contained in the Coulson affidavit (which allegedly provides the Commissioners' methodology), the Commissioners apparently started from the premise that the benefits of this project outweighed the costs and that it was their function to fairly allocate the benefits among the landowners. (LF1118-1119). This assumption is contrary to the provisions of Chapter 245, which requires the Commissioners to view each tract of land and make a determination as to the amount of benefits, and the amount of damages, if any, that will accrue to each

governmental lot, tract or subdivision. Mo. Rev. Stat. § 245.120 (emphasis added). The Commissioners are then charged with organizing each of the individual findings into a chart. Id. They must then estimate the cost of the project and publish the chart and the cost findings in their Report. Id. After the Report has been published and all landowners are allowed to file exceptions to the Commissioners' findings, the Court then determines whether the costs of the levee outweigh its benefits. Mo. Rev. Stat. § 245.135. If so, it must dissolve the District. Id. Accordingly, the duty of the Commissioners under Chapter 245 is to assess individual benefits accrued to each tract and report these findings to the Court. It is only for the Court to determine whether these findings equate to a viable levee district.

The Commissioners here did just the opposite. Instead of determining what benefit, if any, each landowner would receive from the levee, the Commissioners simply ascertained a total assessment figure and attempted to create a formula to divide this figure among the landowners. Nothing in the record indicates how the Commissioners derived the total benefit assessment of \$69,000,000.00. (LF 735-767, 1118-1119). Whether by guess or by method, the Commissioners proceeded from the notion that the landowners protected by the levee would benefit in total by \$69,000,000.00. The Commissioners then apportioned this amount to all the landowners without regard to the individual characteristics of each tract of land.¹⁶ This approach runs counter to the proper procedure under Chapter 245, which

¹⁶ One such characteristic which the Commissioners' formula ignores is pre-existing levees and drainage systems. Section 245.120 requires the Commissioners to give "due consideration and credit to any other levee, ditch or other systems of reclamations which

requires the Commissioners to assess each lot and then leave it for the Court to determine whether the aggregate benefit received by all landowners exceeds the cost of the project. By first calculating an overall benefit and then attempting to reverse-engineer individual tract benefits, the Commissioners failed to follow the scheme envisioned by Chapter 245.¹⁷

may have already been constructed.” The Estate of Ed Young property, for example, contained a man-made levee/earthen protection system which offered partial flood protection to the property. (LF 1086-1087). Nowhere in the formula do the Commissioners take into consideration this or any other existing system of reclamation.

Under the Commissioners’ formula a tract of land may be developed and sit on property below the 100-year flood plain. This would place it into category 1. However, that same piece of land may have an existing system of reclamation which affords it some protection against flooding. The Commissioners’ formula does not account for this mandatory consideration. These issues were presented to the Circuit Court in the Appellants’ written Exceptions. (LF 1075, 1086). These are exactly the types of issues on which the Appellants sought to question the Commissioners.

¹⁷ The holding in In re Tri-County Levee District, 42 S.W.3d 779 (Mo. Ct. App.-E.D. 2001), supports this position. The commissioners in that case examined the individual property at issue and noted specific benefits which the landowner garnered from the existence of the levee. Id. at 788. The commissioners determined that the property, a state highway, would benefit by having increased physical efficiency, decreased maintenance costs, no replacement costs, no closed days due to flooding, and no costs associated with

B. What Little Evidence the Landowners were Able to Obtain Without the Assistance of the Circuit Court or the Levee District Reveals that the Commissioners Made Obvious Mathematical and/or Judgment Errors.

Although Appellants were denied any formal access to the Commissioners' methodology, were not allowed to conduct any discovery, were not able to obtain any affidavit testimony from the Commissioners, and were not allowed to cross-examine or otherwise comment on the evidence presented by the Levee District, the Appellants were able to gather limited information from Commissioner Coulson. The information was gathered via informal conversations with Commissioner Coulson, as he refused to reduce his statements to an affidavit (as he had done for the Levee District). (LF 1152-1157).¹⁸ This information shows that the Commissioners' judgment and/or their mathematics were in error. While this evidence is probative of the "reasonableness" of the Commissioners' findings, it

post-flood clean-up and maintenance. Id. The commissioners in the Tri-County case performed their duties according to Chapter 245 by examining the actual benefits the specific tract of land received from the levee. In the present case, the Commissioners apparently ignored the unique characteristics of each tract of land and placed all tracts into a one-size-fits-all formula. This process ignores the legislative scheme set forth in Chapter 245.

¹⁸ While Appellants are aware that the Circuit Court refused to admit this evidence, this ruling was also in error. This Court should consider this evidence.

also demonstrates the millions of dollars in prejudice the Appellants have potentially experienced.

The best evidence Appellants were able to obtain of the Commissioners' flawed allocation efforts involves the property of Intercontinental Engineering-Manufacturing Corporation ("Intercontinental"). As set forth in the Dickinson affidavit, which summarized information learned from Commissioner Coulson, and as recounted by Levee District Attorney McClelland during the December 6 hearing, Intercontinental's assessment (unlike every other landowner's) is roughly understood. (LF 1152-1153); (Tr. II at 183-85). The Commissioners determined that Intercontinental had 93.8 acres to be assessed. All 93.8 acres were placed into category 2, with a 150% allocation. Under the formula, 93.8 was multiplied by 150% and divided by the total number of "Allocable Acres," which the Levee District mysteriously (and tellingly) knows to be "about 1500 acres." (Tr. II at 184). Placing these numbers into the formula provides that Intercontinental's percentage of the allocation is about 9.3%. In other words, Intercontinental is responsible for 9.3% of the total amount of the landowners' share of this project. This percentage, however, is grossly exaggerated due to misjudgments and miscalculations by the Commissioners.

The Commissioners' determination that 93.8 acres of Intercontinental's property should be assessed in category 2 is wholly unreasonable.¹⁹ Intercontinental only has 55 acres

¹⁹ On page 1151 of the record is a map which was introduced at the hearing on the Motion for Rehearing on December 6, 2001, without objection from the Levee District. The map represents the Intercontinental property. The green section represents areas protected

of land which will be protected by the levee and which could possibly be assessed, 35 of which are undeveloped. In the worst-case scenario, the Commissioners could have placed all 55 protected acres of Intercontinental's property into Category 1 (175%). According to the Commissioners' formula, this would have to have meant that Intercontinental should have only been assessed 6.4% of the project costs ($55 \times 1.75 / 1500 = 6.4\%$). The Commissioners' 9.3% assessment exceeds this figure by approximately 2.9 percentage points, resulting in almost two million dollars in over-assessments.²⁰

by the levee district which are currently developed and used by Intercontinental. The gray section represents undeveloped areas protected by the levee. The red section represents portions of Intercontinental's property which will be taken as rights-of-way to build the levee, and the yellow section represents land falling outside of the levee's protection. The map makes clear that only 55 acres of land will be protected by the levee. The remaining sections of the land will either become part of the levee or fall outside of the levee's protections (making them either not assessable or assessable at 0%).

²⁰ Indeed, Intercontinental's assessment should likely be even lower. By almost any definition, 35 of Intercontinental's 55 protected acres are "undeveloped" and belong in Category 3 (100%) instead of Category 2 (150%). (LF at 1151). The compound effect of the Commissioners' assessing more acres than are protected by the Levee and placing the assessed acres into the wrong category is that Intercontinental has 20 usable acres protected by the Levee, and yet, it has been assessed 9.3% of the total cost of this 1500 acre project. Intercontinental's assessment must be reduced.

Thus, the Commissioners not only failed to adhere to the requirements of Chapter 245 when assessing the benefits in this case, but they also misapplied their own flawed methodology. The Trial Court's decision to affirm the Commissioners' Report must be reversed.

The Levee District argued at the December 6 hearing that these arguments should have been presented in Appellants' Exceptions to Benefits. (Tr. II, p. 161). This argument misses the mark. At the time the Appellants filed their Exceptions, they did not have access to the Coulson Affidavit (which provided the Commissioners' formula), the additional information gathered by Appellants from Commissioner Coulson (which provided the categorization of the property), or the information offered for the first time by attorneys for the Levee District at the December 6th Hearing (which provided the denominator of the formula). It was only after Appellants obtained this information, which they had sought from the Circuit Court prior to filing their Exceptions, that they were able to ascertain the Commissioners' errors. Furthermore, none of the other Appellants/landowners are able to determine how their property was assessed even today. They could hardly be expected to have articulated a challenge to this undisclosed assessment calculation at the time their Exceptions were filed.

IV. The Circuit Court Erred in Confirming the Commissioners' Report, because the Due Process Clauses of the Missouri and Federal Constitutions Require the Government to Afford its Citizens the Opportunity for a Meaningful Hearing and the Right to Discover the Basis for its Actions, Prior to the Taking of Property and/or Assessment of a Tax, and the Trial Court Provided No Meaningful Hearing Whatever.

“[N]or shall any State deprive any person of life, liberty or property, without due process of law.” U.S. Const. amend. XIV. This constitutional principle, along with its companion principle in Article I, Section 10 of the Missouri Constitution, have been implicated by the treatment of the Appellants in the case below. The Circuit Court’s procedures violated the rights of Appellants to due process in the assessment of benefits against them. Moreover, the Circuit Court was cloaked with legislative authority when assessing the benefits against these landowners. The Circuit Court is constrained by the same constitutional requirements as the legislature and is not permitted to tax landowners without any explanation as to how the tax is assessed.²¹

²¹ Appellants are not arguing that Chapter 245 itself is unconstitutional. Rather, Appellants argue that the Circuit Court’s interpretation and application of Chapter 245 violated due process.

A. The Circuit Court Violated Due Process by Failing to Afford the Landowners a Meaningful Opportunity to be Heard via a Summary Proceeding.

Procedural due process imposes certain constraints on governmental decisions that deprive individuals of property interests. Dabin v. Dir. of Revenue, 9 S.W.3d 610, 615 (Mo. 2000) (citing Mathews v. Eldridge, 424 U.S. 319, 332 (1976)). Within the context of the levee and drainage statutes of this State, the Due Process Clause is satisfied if the landowners are “afforded the opportunity and right to be heard at any stage of the proceeding before the tax is levied.” Garden of Eden Drainage Dist. v. Bartlett Trust Co., 50 S.W.2d 627, 632 (Mo. 1932). Any hearing is likewise constrained by the Due Process Clause, which “contemplates the opportunity to be heard at a meaningful time in a meaningful manner.” Moore v. Bd. of Educ., 836 S.W.2d 943, 947 (Mo. 1992). Whenever the government seeks to deprive citizens of their property, the government must give notice of the deprivation and provide an opportunity for a “hearing appropriate to the nature of the case.” Id.

Here, the Circuit Court’s procedures did not comport with the requirements of due process, as Appellants were never afforded the opportunity for a meaningful hearing to present their objections to the Commissioners’ Report. The only “hearing” Appellants were ever afforded prior to the Court confirming the Commissioners’ Report occurred on October 4, 2001. This “proceeding” did not satisfy the demands of due process.

The Circuit Court labeled the October 4 hearing as a “summary proceeding.” (Tr.I, p. 9). The Court initially defined the scope of the hearing as follows: it was an “opportunity to make a record of such legal arguments, file affidavits, anything that you wish to present

except live testimony. If you wish to present live testimony, you'll have an opportunity to file exceptions after I make this decision and have a jury trial." Id. at 9, 13. The Court further stated that the benefits issue would be addressed during the same jury trial to be held on the issue of damages. Id. at 14. Attorneys for the Levee District argued that the landowners were not entitled to a jury trial on the issue of assessment of benefits. Id. at 72. The Levee District then suggested that it was inappropriate, if not impossible, to even "try and second guess" the work performed by the Commissioners. Id. at 75-78.²²

At no time during the October 4 hearing did the Court allow live testimony of any kind, nor did it permit the landowners to have access to the Commissioners' assumptions and methodology. Instead, the hearing was dominated by procedural questions as to how the process would move forward. (Tr. I, at pp. 9-14, 71-88, 144). On October 23, 2001, the Circuit Court confirmed the Commissioners' Report. (LF 1120-29).

The Circuit Court's procedures failed to provide a meaningful hearing appropriate to the issues at stake in this case. First, the October 4 hearing was not meaningful. There was no opportunity to present witnesses nor were the Appellants given any access to the

²² Query as to whether the attorneys for the Levee District would be so *laissez faire* as to the Commissioners' methodology if the Commissioners' findings had not equated to a viable levee district? If the Commissioners had found a total benefit of 45 million dollars it is doubtful that the Levee District would have simply accepted this finding without any inquiry and dissolved the District. Apparently, ignorance is bliss when the outcome is favorable.

Commissioners' work. The Court was never presented with any evidence of what the Commissioners in fact had done. Accordingly, the October 4 hearing did not provide a meaningful opportunity to be heard, and the Circuit's decision to affirm the Commissioners' Report must be reversed. See Dabin v. Dir. of Revenue, 9 S.W.3d 610, 615 (Mo. 2000) (holding that the decision of the circuit court to affirm the decision of a traffic court commissioner who revoked two motorists' drivers licenses was in error because the motorists "were not afforded an opportunity to challenge the commissioner's findings of fact in a meaningful manner.").

Further, the Circuit Court violated due process by considering the Coulson affidavit when making its final determination that the Commissioners' methodology was reasonable. As discussed elsewhere in this brief, it is wholly unfair and prejudicial for a trial court to accept affidavit testimony from one side of the litigation without allowing the opposing party to at least respond to this new evidence.

Finally, the Circuit Court violated due process by its failure to allow the Appellants the opportunity to present live testimony, examine the Commissioners as to the work they had performed, and examine relevant Levee District officials. At a minimum, the Circuit Court was constrained by the principles of due process to at least order the Commissioners to reveal their methodology to the Appellants so that Appellants could meaningfully challenge the Commissioners' Report at a hearing. Appellants were not given the process due a \$69,000,000.00 determination.

**B. The Circuit Court was Delegated with Legislative Taxing Authority
and Cannot Engage in “Taxation Without Explanation.”**

In enacting Chapter 245, the Missouri Legislature delegated to the circuit courts of this State the legislative power to fix special assessments for the construction of levee districts. Mo. Rev. Stat. § 245.180; see also Birmingham Drainage Dist. v. Chi., B. & Q.R.R., 202 S.W. 404, 407 (Mo. 1917) (discussing drainage districts). With this delegated power, the Circuit Court is constrained by the same constitutional requirements as the legislature in assessing this tax. One such constitutional constraint is the principle of uniformity. Mo. Const. art. X, § 3. For instance, Missouri courts have held that where a property was assessed at a rate higher than the uniform level of assessment for similarly situated property in a county, the assessment was a violation of the State and Federal Due Process Clauses as well as the uniformity provision of the Missouri Constitution, Article X, Section 3. Hopkins v. Odom, 619 S.W.2d 857, 859 (Mo. Ct. App.-W.D. 1981). The Hopkins court expounded this taxing principle by holding that uniformity and equality were the “just and ultimate purpose of the law.” Id. (quoting Sioux City Bridge Co. v. Dakota County, Neb., 260 U.S. 441, 445-47 (1923)).

Implicit in the constitutional right to uniformity in the assessment of a tax is the ability to know how the taxing authority levied the tax at issue. Without such knowledge, the taxed individuals have no means of determining whether in fact their rights have been violated. The present case presents the perfect example. The Circuit Court’s Confirming Order authorizes the Levee District to assess a tax against all landowners within the bounds of the project in proportion to the benefit each landowner received. Mo. Rev. Stat. §

245.180. The benefit assessment authorized by the Circuit Court was based on the Report of the Commissioners. The Commissioners' assessment in the Report, set forth in terms of total dollars of benefits, varies from tract to tract. (LF 735-767). Nowhere within the Report do the Commissioners reveal how they determined the assessment of benefits for each tract of land. Thus, there is no way for any of the landowners to know whether they were taxed in a manner uniform and equal to other similarly situated landowners within the District.

A taxing authority cannot assess a tax in secret and force its citizenry to pay the assessment without any explanation of the method of calculating the tax. "Taxation without explanation" violates due process. By confirming the Commissioners' Report under the procedures afforded below, the Circuit Court provided a mechanism by which Appellants would be taxed without any knowledge as to the basis for this tax. Due Process does not allow a tax to be imposed on such a basis. The actions of the Trial Court below in affirming the Commissioners' Report should be reversed.

CONCLUSION

The Appellants seek a remand to the Circuit Court with instructions that the Court provide the landowners with a meaningful opportunity to file Exceptions to the Commissioners' Report and to have those Exceptions determined via a summary proceeding. More specifically, the Appellants seek access to the Commissioners' activities, deliberations, and most importantly, methodology. After receiving such information Appellants request that they be allowed to present their Exceptions to the Commissioners' Report at a meaningful summary proceeding that comports with due process. At a minimum, due process requires a bench trial where Appellants can present limited live testimony and other evidence, as well as examine the Commissioners and relevant Levee District officials.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing brief contains 14,050 words and therefore complies with the limitations contained in Rule 84.06(b). Pursuant to Rule 84.06(g), the diskette provided to the Court with the original of this brief has been scanned and determined to be virus-free. I further certify that one copy of Appellants' Brief plus one copy on diskette were duly mailed, postage prepaid, this 18th day of July, 2003, to each of the following:

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